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In the Supreme Court of the United States

October Term, 1972

No. .....

VIRGINIA MANNING, *et al.*,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners, Virginia Manning, *et al.*, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on September 11, 1972.

REPORTS OF OPINIONS

The opinion of the Court of Appeals has not yet appeared in Federal Reporter 2d. It has been reported at 5 EPD para. 7964 (CCH). The decision of the trial court, The United States District Court for the Northern District of Ohio, Western Division, was not printed in the federal supplements but was reported at 3 EPD para. 8325. The appellate decision is annexed hereto as Appendix A. The District Court decision is annexed hereto as Appendix B. The order of the Court is annexed as Appendix C.

JURISDICTION OF THE COURT

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit are dated September 11, 1972, and were entered on that date. Rehearing was not sought by any of the parties. None of the parties requested any extension of time for filing a petition for writ of certiorari, and the present petition is filed within ninety (90) days of the entry of the opinion and judgment of the Sixth Circuit Court of Appeals. The jurisdiction of this Court to review the judgment below is invoked under 28 U. S. C. Section 1254(1), and the appeal is timely pursuant to 28 U. S. C. Section 2101(c).

QUESTION PRESENTED FOR REVIEW

This petition is limited to the question of whether back wages and lost employee remuneration should be awarded to plaintiffs *who were intentionally discriminated against* in a Title VII Civil Rights of 1964 suit (42 U. S. C. Sections 2000e, *et seq.*).

STATUTE INVOLVED

Petitioners seek relief by way of an award for damages under Section 706 of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5(g), which on the date these actions were filed read as follows:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title."

STATEMENT OF THE CASE

The petitioners are a class of female employees at the Sandusky, Ohio, plant of General Motors Corporation. The petitioners originally filed Title VII charges in 1967 alleging that General Motors discriminated against them based upon their sex. Suit was timely filed by petitioners on October 31, 1969; and General Motors answered that any discrimination was required by Ohio Revised Code Section 4107.43, which prohibited "frequent or repeated lifting of weights over twenty-five pounds", and Section 4107.46, which prohibited the employment of females for more than forty-eight (48) hours per week, nine (9) hours per day, or six (6) days per week. The District Court held that the Ohio statutes were preempted by Title VII. Appendix B, page 9. The Court specifically held that the respondent did intentionally engage in an unlawful employment practice and did, in fact, discriminate against petitioners based upon their sex. The District Court, however, limited its relief to declaring the Ohio statutes invalid and awarding reasonable attorneys' fees but declining any award for lost remuneration because of the good faith reliance of the respondent upon the Ohio statutes.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit from that part of the judgment which denied an award of monetary damages. The Court of Appeals affirmed the District Court for two reasons: (1) When the respondent, on May 1, 1970, voluntarily ceased to comply with Ohio statutes, it had not yet had the benefit of any judicial determination preempting the Ohio statutes and (2) the Equal Employment Opportunity Commission did not definitively resolve the conflict between Ohio statutes and Title VII until August 19, 1969. The

Court of Appeals held that based upon those two factors and "all the circumstances of this case" they could not find an abuse of discretion in the District Court's refusal to award back pay.

REASONS FOR GRANTING A WRIT

1. The Decision of the Court Below Is in Direct Conflict with the Decision of the United States Court of Appeals for the Ninth Circuit in the Case of Schaeffer v. San Diego Yellow Cabs, Inc. (June 20, 1972), ... F.2d ....., 4 EPD para. 7882 (CCH), Appendix D.

The Court of Appeals in *Schaeffer v. San Diego Yellow Cabs, Inc., supra*, Appendix D, awarded back wages in a fact situation which is not as strong as the fact situation in the present case. *Schaeffer* was confronted with a California statute which restricted the hourly employment of females. In comparison, the present case involves restrictions of female employment concerning hours, job classifications, and weight lifting. In *Schaeffer*, as in the present case, the employer defended on the basis that the state statute required the discrimination and that, therefore, it was in good faith. *Schaeffer* first filed charges in 1967, which were rejected by the Equal Employment Opportunity Commission in that same year. *Schaeffer* refiled charges in January of 1968. In November of 1968, one of the Federal District Courts in California issued its opinion holding the California statute to be preempted by Title VII. *Rosenfeld v. Southern Pacific Co.* (D.C. Cal., 1968), 293 F. Supp. 1219, 1 EPD para. 9929. The District Court in the *Schaeffer* case had denied back pay. On appeal, the Ninth Circuit reversed and remanded, holding that *Schaeffer* was ". . . entitled to receive back pay for the extra hour

per day from the date when the Company had knowledge of both the *Rosenfeld* case *and* the Commission's decision in favor of Schaeffer (i.e., on some undetermined date subsequent to 1/22/69, to and including 10/7/69, the date the company allowed 9-hour daily employment for women)." Appendix D.

The Ninth Circuit in *Schaeffer* held that ". . . the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good-faith employer." Appendix D. In the present case, neither the District Court nor the Sixth Circuit Court of Appeals examined the merits of the petitioners' claims nor the public policy behind them nor did the lower courts balance the petitioners' claims against whatever hardship or lack thereof an award of back wages would have had upon the respondent, General Motors Corporation.

The Court in *Schaeffer* specifically found that it would be ". . . unfair to force an innocent employee to forego his rights under law while litigation drags through the courts. . . ." Appendix D. The courts in the present case have held just the opposite. They have found that innocent employees should forego their rights while litigation drags through the courts. In the present case, the petitioners have done everything within their power since the filing of charges in 1967. The respondent, General Motors Corporation, voluntarily continued to adhere to Ohio statutes, to the detriment of the petitioners, until May 1, 1970, when it voluntarily ceased complying with Ohio statutes. This voluntary change of policy was done without necessity of any decision by any court having jurisdiction over the Ohio statutes, and it was accomplished six (6) months after petitioners filed their present action. In addition, General Motors Corporation has extensive

plants, does extensive business in California, and must have been aware of the *Rosenfeld, supra,* decision in 1968 preempting less restrictive state statutes. The respondent having voluntarily elected to abide by statutes which it knew to be in jeopardy should have borne whatever loss was suffered, especially in comparison to the position of the successful petitioners.

If the *Schaeffer* case were applied to the present fact situation, an award of back wages would be ordered paid by the respondent to the petitioners. It is submitted that the District Court erred in not awarding back pay to the petitioners.

2. The Award of Back Wages for Intentional Sex Discrimination Is an Important Question of Federal Law Which Has Not Yet Been, but Should Be, Settled by This Honorable Court.

This Court in *Griggs v. Duke Power Co.* (U.S. S. Ct., 1971), 91 S. Ct. 849, 401 U.S. 424, 28 L. ed. 2d 158, held that ". . . Congress directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply the motivation." Yet despite this prior pronouncement, this Court has never passed upon the obligation to award back wages to successful litigants who were the victims of intentional sex discrimination, even though the respondent alleges that certain state statutes required such discrimination.

There can be no question but that private litigants in the position of petitioners act as private attorney generals to vindicate Congressional policy which is determined to be of highest priority. *Bowe v. Colgate-Palmolive Co.* (C.A. 7, 1969), 416 F.2d 711, 61 LC para. 9326, reversing 272 F. Supp. 332, 56 LC para. 9069 (D.C. Ind., 1967). The

Bowe case, *supra*, further found that the right to award back wages should be broadly read so as to ". . . effectively terminate the practice and make its victim whole."

In the present fact situation, the male counterparts at respondent's plants have benefits in comparison to the petitioners. They received the better-paying jobs and the overtime, time-and-a-half, and double-time benefits. The economic loss is, therefore, to be suffered by either the females or General Motors Corporation. It is unfair and inequitable to say that the successful litigants, having established intentional acts of discrimination and having done all that they could do since 1967, should suffer the economic loss in comparison to General Motors Corporation, which voluntarily elected to follow and eventually voluntarily elected to cease abiding by state statutes, while at all times knowing full well of the course of litigation and of the decisions such as *Rosenfeld, supra*. If the decision of the Sixth Circuit below is permitted to stand, it will have a distinct chilling effect tending to prevent persons discriminated against from undertaking the tedious and demanding pursuit of their rights. If employers can pick and choose between statutes and voluntarily adhere to and then denounce their prior elections with complete impunity, there exists no incentive for individuals to attempt to enforce the Congressional policy.

Title VII, 42 U. S. C. Section 2000e-12(b), does provide for an exception to employer liability. Pursuant to that section, General Motors could have requested and received a written interpretation or opinion from the Equal Employment Opportunity Commission and, by statute, could have been exonerated from any liability. General Motors was aware of the conflict, Appendix A, yet did not seek to ultilize the statutory exception. Having not utilized the statutory exception, the respondent should not be per-

mitted to escape liability and to shift the economic loss to the petitioners.

CONCLUSION

In the present case, an award of back pay to the petitioners should be made. The lower court decisions are in error in denying an award of back pay in this case. The decision of the Sixth Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals in *Schaeffer, supra,* and with the Seventh Circuit Court of Appeals in *Bowe, supra.*

The issue of the appropriateness of an award of back wages under Title VII is of utmost importance in determining the future course of litigation and the consequences of such future litigation. A decision by this Honorable Court is necessary in order to give guidance to the lower courts and to bring uniformity between the litigants.

A writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

Opinion and Order of the Court of Appeals

(Decided and Filed September 11, 1972)

Nos. 71-2068, 71-2069 & 71-2070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA MANNING, ETC.,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION, ETC., ET AL.,
Defendants-Appellants,

VIRGINIA MANNING, ETC.,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants-Appellees.

VIRGINIA MANNING, ETC.,
Plaintiff-Cross-Appellee,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants-Cross-Appellants.

APPEAL from the United States District Court
for the Northern District of Ohio.

Before: PHILLIPS, Chief Judge, KENT, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

KENT, Circuit Judge. These appeals and cross-appeals are from a class action challenging General Motors Corporation's compliance with the Ohio "female protective statutes," particularly Sections 4107.42, 4107.43 and 4107.46, Ohio Revised Code. Section 4107.42 deals with *"Working conditions for females,"* Section 4107.43 deals with *"Occupations in which employment of females prohibited,"* and Section 4107.46 deals with *"Total hours and days of employment."*

In her complaint, the plaintiff, on behalf of herself and the members of her class, alleged that by complying with the Ohio Statutes General Motors was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e et seq., particularly Title 42 U.S.C.A., § 2000e-2(a)(1), which forbids discrimination in employment against any individual on the basis of sex.

The original action was commenced against General Motors, but, on motion by General Motors, the appropriate Ohio authorities, the International Union United Automobile Aerospace and Agricultural Implement Workers of America (International), and Local 913 U.A.W. (Local) were added as parties-defendant. Subsequently, the District Court realigned the parties and made the International and the Local parties-plaintiff.[1]

After appropriate proceedings under the provisions of Rule 23, Rules of Civil Procedure, 28 U.S.C.A., the trial judge determined that there was a proper class action, and that the plaintiff, Virginia Manning, was an appropriate representative of the class. We find no merit to the challenge to these conclusions. Class actions are an appropriate

1. For some undisclosed reason the International and the Local continued to be named as defendants despite the order of the trial court.

vehicle for challenges to discriminatory employment practices, *Blue Bell Boots, Inc. v. E.E.O.C.*, 418 F.2d 355 (6th Cir. 1969).

After motions for summary judgment by all parties, the trial court concluded that the Ohio female protective laws in question were invalid as being in conflict with Title VII of the Civil Rights Act of 1964, and, therefore, ineffective. From this decision the State of Ohio appealed. Subsequently, the Supreme Court of Ohio, in *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 281 N.W. 2d 1 (1972), reached the same conclusion, and the State of Ohio was permitted to withdraw its appeal and this issue is not now before this Court.

The trial court, by its final order, denied an injunction because General Motors had ceased to comply with the Ohio female protective laws as of May 1, 1970; it denied back pay to the female employees of General Motors. In its order the trial court determined that the plaintiffs were entitled to reasonable attorney fees but made no determination of amount.[2] The trial court retained jurisdiction "to insure that General Motors does not alter its policy and commence complying with said Ohio female protective legislation." (App. pg. 151).

On this appeal we are required only to consider whether the order of the District Court afforded to the plaintiffs the relief to which they were entitled, and whether such relief was "appropriate" within the meaning of Title 42, U.S.C.A. § 2000e-5.

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2. "FURTHER ORDERED that the plaintiffs are entitled to an award of reasonable attorney fees against the defendant General Motors Corporation to be agreed upon between the parties and, if they are unable to so agree, to advise the Court and that this matter will then be set for a hearing to determine same." (App. pgs. 151, 152).

General Motors conceded in the trial court that it had complied with the Ohio female protective laws and that as a result thereof it had denied certain jobs to females and had denied overtime opportunities to females. It defended on the ground that it had acted in good faith because of the uncertainty as to the validity of the Ohio female protective legislation.

A summary of the facts is appropriate. The authorities of the State of Ohio enforced the Ohio statutes relating to the employment and circumstances of employment of females until September 4, 1969, when the Director of the Ohio Department of Industrial Relations, by a letter addressed to the Chief, Division of Women and Minors and Minimum Wage, advised: "* * * effective September 4, 1969, this department will not prosecute any alleged violations of the Ohio female labor laws that are in conflict with the new federal rules as published by Equal Employment Opportunity Commission." (Exh. E, App. pg. 81). This letter was written because of a change in the guidelines by the Equal Employment Opportunity Commission issued August 19, 1969. On October 22, 1969, the general counsel for the International and the assistant general counsel for General Motors joined in a letter to the Director of the Department of Industrial Relations, requesting that a ruling be obtained from the Attorney General of Ohio as to the validity of the Ohio female labor laws in light of Title VII of the Civil Rights Act of 1964 and the sex discrimination guidelines issued by the Equal Employment Opportunity Commission on August 19, 1969. The Director of the Department of Industrial Relations refused to request such an opinion, and in his letter to the International and General Motors stated:

> "Notwithstanding the action taken by this department, any county prosecutor, law director, or city solic-

itor could prosecute if he so chooses. Accordingly, an employer is not immune from all liability from our action." (Exh. G, App. pg. 86).

This lawsuit was filed on October 31, 1969, and the Ohio authorities, including the Director of the Department of Industrial Relations, were made parties-defendant on March 13, 1970. Despite the pendency of the lawsuit, the Director of the Department of Industrial Relations issued a public statement on September 14, 1970, stating *inter alia*:

> "Accordingly, effective immediately, the Ohio Department of Industrial Relations will prosecute employers that employ women in violation of the Ohio Female Labor Laws." (Exh. H, App. pg. 87).

Prior to the commencement of this lawsuit this plaintiff and other females had filed charges of unlawful discrimination with the Equal Employment Opportunity Commission. No women who filed a complaint against General Motors, based upon Ohio employment, obtained a favorable ruling before the Equal Employment Opportunity Commission until March 28, 1969, when the Equal Employment Opportunity Commission entered a decision in favor of this plaintiff and a number of others, holding that General Motors was acting in violation of Title VII of the Civil Rights Act of 1964 in complying with the Ohio female protective laws.

The Equal Employment Opportunity Commission did not take a firm position with regard to the conflict between State female protective laws and Title VII of the Civil Rights Act of 1964 until it handed down its revised guidelines relating to sexual discrimination in employment on August 19, 1969.[3] Obviously, the defendant, General Motors,

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3. For a discussion of the problems of an employer attempting to comply with state laws which restrict employment of women

(*Continued on following page*)

was on the horns of a dilemma. No definitive judicial interpretation of the conflicts between the female protective laws of the states and Title VII of the Civil Rights Act had been handed down. No court had declared that the Ohio statutes were ineffective because the field had been preempted by the federal legislation, thus making applicable the provisions of the Supremacy Clause of the United States Constitution, Article VI, Section 2, and the Equal Employment Opportunity Commission did not take a firm position on the issue until two months before this lawsuit was commenced. Until that time the Commission had not taken any official position as to the enforceability of laws such as those with which we are here concerned, the Ohio authorities, except as herein set forth, had at all times insisted that the Ohio statutes were applicable to employment of females in industrial plants in Ohio.

On May 1, 1970, while this action was pending, defendant, General Motors, ceased to comply with the Ohio female protective laws and continued to refuse to comply with such laws despite the fact that the Court of Appeals for Franklin County, Ohio, found the laws valid on March 9, 1971. *Jones Metal Products Co. v. Walker*, 25 Ohio App. 2d 141, 267 N.E.2d 814, Reversed 29 Ohio St.2d 173, 281 N.E.2d 1 (1972). We find no fault with the District Court's refusal of an injunction which could have done no more than restrain the defendant, General Motors, from doing that which it had not been doing for more than a year before the date the District Court order was entered. Ade-

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Footnote continued—
and at the same time comply with the Civil Rights Act of 1964, including a discussion of the vacillation of the Equal Employment Opportunity Commission, see the carefully prepared opinion by United States District Judge Gerald J. Weber in *Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D.Pa. 1971). See also *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971), for a discussion of the conflict between the Civil Rights Act of 1964 and state laws.

quate protection was afforded to the plaintiffs by the trial court's retention of jurisdiction in order to insure that General Motors would not change its policy. The Court may wish to reconsider this issue after remand in the light of the decision of the Ohio Supreme Court in *Jones Metal Products Co. v. Walker, supra.*

The plaintiffs, including the unions, suggest that the Courts of Appeals which have considered Title VII of the Civil Rights Act of 1964 have granted back pay. It is suggested in plaintiffs' brief that back pay has been ordered even though there has been a claim of good faith. A close analysis of the cases cited, however, is very enlightening. *Weeks v. Southern Bell Telephone & Telegraph Company,* 408 F.2d 228 (5th Cir. 1969), was a case in which the Georgia rule relating to weights which women could lift had been repealed before the case was before the Court of Appeals and the case was remanded for determination of the appropriate relief. *Bowe v. Colgate-Palmolive Company,* 416 F.2d 711 (7th Cir. 1969), involved no statute and related to a company-imposed weight limitation for female employees. *Robinson v. Lorillard Corporation,* 444 F.2d 791 (4th Cir. 1971), involved color discrimination and no state statute was involved. A decision by the United States Supreme Court, *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), granted relief, but was concerned with a company rule and not with a state statute. And the Court of Appeals for the Ninth Circuit in *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971), affirmed one decision denying damages, but subsequently, in an opinion handed down on June 20, 1972, reversed a trial court's decision which had denied back pay. *Schaeffer v. San Diego Yellow Cabs, Inc.,* No. 71-1442, June 20, 1972. However, in *Schaeffer* the Court concluded that under the circumstances in that case the employer was not justified

in relying upon the California statutes despite the language in *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219, 1227, where the same Court said:

> "Prior to a judicial determination such as evidenced by this opinion, an employer can hardly be faulted for following the explicit provisions of applicable state law."

LaBlanc v. Southern Bell Telephone & Telegraph Co., 333 F.Supp. 602 (E.D.La. 1971), denied back pay in a case in which the plaintiff successfully challenged the Louisiana female protective statute. The District Court's decision was affirmed in a per curiam opinion of the Fifth Circuit Court of Appeals in *LaBlanc v. Southern Bell Telephone & Telegraph Co.*, No. 71-3402, May 25, 1972. A similar result was reached in *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore., 1969), a case involving a female protective order by a state commission.

The Supreme Court has stated that administrative interpretations by the enforcing agency are entitled to great deference, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), but that Court has also held that "state statutes, like federal ones, are entitled to the presumption of constitutionality until their validity is judicially declared." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). The defendant, General Motors, did not have the benefit of any judicial determination of the validity of the Ohio female protective laws until 1971, and the enforcing agency had not handed down any definitive administrative interpretation which would assist in resolving the conflict between any such state statutes and the provisions of Title VII until August 19, 1969. Under all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these plaintiffs.

We do not reach the issue of the propriety of the allowance of attorney fees as permitted by Section 706(k) of the Act, 42 U.S.C.A. § 2000e-5(k) because the District Judge did not enter any final appealable order on this issue.

For the reasons herein stated and for the reasons set forth in the memorandum opinion of District Judge Don J. Young the judgment of the District Court is affirmed.

Order of the Court of Appeals

(Filed September 11, 1972)

No. 71-2069*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA MANNING, etc.,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Defendants-Appellees.

Before: PHILLIPS, *Chief Judge*, KENT, *Circuit Judge*, and McALLISTER, *Senior Circuit Judge*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

**Note*: Identical judgments were entered in the related appellate Docket Nos. 71-2068 and 71-2070.

APPENDIX B

Opinion of the District Court

(Filed August 10, 1971)

Civil No. 69-334

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

VIRGINIA MANNING, ETC.,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, *et al.*,
Defendants.

OPINION

YOUNG, *J*:

This cause came to be heard on defendants' General Motors, William O. Walker, and Gabriel Blumer, representatives of the State of Ohio, motion for summary and declaratory judgment; motion of plaintiff Virginia Manning and her class for declaratory judgment; and upon the motion of plaintiffs International Union and Local 913 for declaratory and summary judgment. The Court having considered all of the documents filed with respect to said motions, the pleadings, affidavits, and memoranda, and having heretofore made an order permitting plaintiffs to proceed as a class, and having heretofore ordered the addition of the State of Ohio as a party defendant, concludes

that the motions for summary and declaratory judgment are well taken, as there is no genuine dispute with regard to a fact which is material to the resolution of the issues before the Court.

At the outset, this Court will state some of its conclusions of law:

1. Jurisdiction has been properly invoked pursuant to 42 U.S.C. §2000e-5(f);

2. General Motors is an employer within the meaning of 42 U.S.C. §§2000e and 2000e-2;

3. The plaintiffs have complied with all procedural requirements under Title VII of the Civil Rights Act of 1964 necessary for the commencement and maintenance of this action.

4. This action constitutes an actual case or controversy between the parties hereto, as contemplated by 28 U.S.C. §2201;

5. As stated in a prior memorandum of this Court, filed on January 6, 1971, plaintiff was given permission to proceed with this suit as a class action.

The three issues presented in this case are:

1. Whether the plaintiffs' release of Local 913, pursuant to the consummation of a conciliation agreement between plaintiffs and Local 913, which was formulated by the Equal Employment Opportunities Commission, hereinafter referred to as EEOC, by operation of law resulted in the release of General Motors for all actions arising from the violation of Title VII of the Civil Rights Act of 1964;

2. Whether the Ohio "protective" laws, particularly Ohio Revised Code §§4107.42, 4107.43, and 4107.46,

are in conflict with or superseded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*;

3. Whether General Motors should be held liable for the unlawful employment practices engaged in.

ISSUE I

The first issue before the Court is whether the plaintiffs' release of Local 913, pursuant to the consummation of a conciliation agreement between the plaintiffs and said Local, which was formulated by the Equal Employment Opportunity Commission, hereinafter referred to as EEOC, by operation of law resulted in the release of General Motors for all actions arising from the violation of Title VII of the Civil Rights Act of 1964.

This is a case of first impression, as to what is the legal effect upon a third party which is charged with having violated 42 U.S.C. §2000e-2(a) of Title VII of the Civil Rights Act, when that third party does not join in the conciliation agreement formulated by the agency, which is charged with the statutory duty of trying to bring about compromise and settlement with regard to the alleged unlawful employment practices, so as to right the wrong and obviate the necessity of the complainants turning to the courts and instituting a civil rights action for the redress of grievances.

General Motors, which was charged as the "Respondent Employer" by the plaintiffs before the EEOC, contends that the conciliation agreement between the plaintiffs and Local 913, hereinafter referred to as Local, the other respondent party charged before the EEOC with having violated 42 U.S.C. §2000e-2(a), is merely a release of the latter, since the complainants failed expressly to reserve

any rights which they had or may have had against General Motors. General Motors argues that according to the well settled law of the State of Ohio, or federal law, if this Court determines that the latter is applicable, the release which was given to Local inures to the benefit of General Motors, because they are joint tortfeasors and the plaintiffs did not expressly reserve the rights which they had or may have had against General Motors. General Motors refers to the third paragraph of the general provisions of the conciliation agreement, a copy of which is attached as Exhibit "A" to the motion of both unions for dismissal as parties defendant, which is part of the record, and contends that the language employed therein is indicative of the fact that the conciliation agreement entered into is a release. Rather than concentrate on any one provision of the conciliation agreement, the agreement should be construed as a whole. General Motors argues that the conciliation agreement is merely an example of the average common or garden variety type release. This Court rejects that contention, because it would be contrary to the policy of encouraging voluntary compliance with the law whenever possible. In light of the apparent conscious intention of General Motors not to become a party to the conciliation agreement, permitting it to ride the coattails of Local and reap the benefits of that settlement would be unconscionable. This Court will not be the first to determine that a conciliation agreement negotiated by a federal administrative agency is merely a release. To accept General Motors' contention would tend to frustrate the Congressional purpose of fostering voluntary compliance with settlement agreements devised by the administrative agency which Congress entrusted with developing expertise in implementing Title VII Civil Rights policy, so as to eliminate unlawful employment practices

by employers and labor organizations. Congress intended, where possible, to obviate the necessity of having complainants turn toward the federal judiciary for a redress of the unlawful employment practices based upon sex discrimination, see 42 U.S.C. §2000e-5 *et seq.*, if action taken by the proper agency can adjudicate the dispute, except for, of course, judicial review of administrative action. *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969). General Motors made its choice and now must accept the consequences of it.

Since this issue is one of first impression, this Court is faced with the alternative of construing the conciliation agreement as a release or as a partial settlement, initiated by the agency which has a statutory duty of fostering conciliation between the adverse parties whenever possible. 42 U.S.C. §2000e-5(e). If this Court were to conclude that the conciliation agreement is a release, there would be a strong probability that by operation of law General Motors would be free of all liability for various employment practices, notwithstanding the fact that the EEOC determined there was reasonable cause to believe that the employment practices in question were in contravention of Title VII of the Civil Rights Act of 1964. On the other hand, if this Court were to determine that the conciliation agreement is a partial settlement of the case which was pending before the EEOC, and is now pending before this Court, General Motors would not be relieved of liability by operation of law. Furthermore, it would not be placed at a disadvantage, except with regard to its own affirmative action in not being a party to the conciliation agreement. The latter alternative is the better view, because it does not penalize the complainant party who enters into a conciliation agreement at the initiative of the EEOC with less than all parties charged before that agency, while the

former alternative does. The partial settlement negotiated by the EEOC executes the well settled Congressional purpose of reducing the number of cases which must be filed in federal court in order to perfect the adjudication of rights and obligations between adverse parties. As far as the instant case is concerned, it is not necessary for this Court to delve into the alleged unlawful employment practices of Local, as a result of the conciliation agreement entered into between the plaintiffs and Local, which is a complete settlement of their differences. Therefore, the Congressional mandate of reducing the complexity of cases coming before the courts which fall within one of the substantative areas of the law for which an agency has been established for purposes of adjudication, has been complied with.

When complainants have a case pending before the EEOC, this Court deems it desirable to encourage them to engage in meaningful negotiations with the adverse parties via the conciliatory efforts of the EEOC. Such action fosters the Congressional mandate of resolving past unlawful employment practices on a voluntary basis, and thus obviates the necessity of engaging in protracted civil rights litigation in the federal arena. To effectuate that goal, it is necessary to assure complainants that although they may not be represented by counsel in that state of the proceedings, as they were not in the instant case, any fair settlement which they may reach with less than all adverse parties will not via an antiquated theory—release of one joint tortfeasor—carried over from the area of tort law, operate as a release of all others, regardless of whether the complainants have received full compensation for the injuries which have been sustained.

It would be imprudent for this Court to conclude that where the EEOC can only assist in arriving at a settle-

ment between half of the adverse parties, the complainants should be held to have waived their rights against the remaining adverse parties, unless they specifically reserved their rights against the other adverse parties, especially when the complainants are not represented by counsel. Such a holding would tend to frustrate the Congressional purpose of requiring the adverse parties to air their differences before the EEOC with the hope of achieving a voluntary compliance, and thus effectuate a reduction of the federal court caseload. If the agency's conciliatory efforts fall short of gaining full acceptance by all the parties, to foster the acceptance of the partial settlement by the complainants, the latter must be assured that the partial settlement will not constitute a bar to the subsequent instituting of a civil action in federal court for the redress of grievances against the recalcitrant party. Whether they may bring an action against the party who fails to join in the conciliation agreement should not turn upon whether the complainants reserve the rights they have or may have against that non-joining party. The paramount concern is freedom from discrimination. Thus, this Court deems it appropriate to insist upon the same stringent requirement which is utilized in waiver of constitutional rights—that it has been knowingly, intelligently and willingly made. *Faye v. Noia,* 372 U.S. 391, 439 (1963). At the very least, the basic contract law doctrine of "informed consent" should be required. See, e.g., *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A.2d 69 (1960); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1252 (1971).

This Court will not be forced into reaching the unconscionable result of holding that by operation of law, the release given to Local inures to the benefit of General Motors. General Motors should and will be held account-

able for its affirmative failure to become a party to the EEOC negotiated conciliation agreement, which was designed to settle case numbers CL-6-4-2816, CL-7-1-5U, CL-7-3-1638U, which were pending before the EEOC.

A fortiori, the aforementioned reasoning applies to the case at bar, because the conciliation agreement formulated by the EEOC, and finally approved by the agency on February 24, 1970, took effect and was binding on the plaintiffs subsequent to the date they instituted suit in this Court. On October 31, 1969, within thirty days of having received the letter from the EEOC notifying them of its inability to effectuate a viable conciliation agreement, the plaintiffs filed suit in this Court. As of the time the conciliation agreement was consummated, the plaintiffs did not have a legal duty to be made a party to it, since the conciliatory efforts prior to the instituting of suit in federal court were thwarted, as evidenced by the EEOC's letter of October 10, 1969. Thus, the decision of the plaintiffs to abide by the terms of the conciliation agreement formulated subsequent to having filed suit in this Court, although not legally required until accepted by plaintiffs, as has, it is undisputed, been done, is in furtherance of the Congressional policy, as evidenced by 42 U.S.C. §2000e-5(e), of achieving a voluntary compliance with Title VII, and should be encouraged as it reduces the complexity of cases required to be adjudicated in federal court. In *Dent v. St. Louis-San Francisco Railway Co., supra*, the court stated that voluntary compliance both before and after court action is preferable to court action. The holding of this case will serve as future encouragement to such compliance.

Therefore, it is the conclusion of this Court that the conciliation agreement in question was a settlement of the complainants' case against Local only, and does not auto-

matically operate as a bar to the instituted action against General Motors.

ISSUE II

The second issue to be determined is whether the Ohio "protective" laws, particularly Ohio Revised Code §§ 4107.42, 4107.43 and 4107.46, are in conflict with or superseded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*

Section 4107.42 provides:

> Every person . . . employing females in any factory . . . shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employees are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employees. . . .

Section 4107.43 provides:

> The employment of females in the following occupations or capacities is prohibited:
>
> . . . in employments requiring frequent or repeated lifting of weights over twenty-five pounds.

Section 4107.46 provides:

> (A) No employer shall employ a female for more than forty-eight hours in any one week or eight hours in any one day, or on more than six days in a calendar week . . . except that:
>
> (1) In manufacturing establishments a female may not be employed more than forty-eight hours in any one week or nine hours in any day, or on more than six days in a calendar week.

> (E) No employer shall employ a female for a period of more than five hours of continuous labor unless such period is broken by a meal period of at least one-half hour . . . .

The plaintiffs contend that in complying with the aforementioned sections of the Ohio Revised Code, General Motors pursued employment practices which constituted discrimination within the meaning of 42 U.S.C. §2000e-2(a). As a result of those alleged unlawful employment practices, plaintiffs contend they were not assigned to certain jobs which were reserved by men only, and thus were discriminated against with respect to compensation, terms, conditions and privileges of employment solely on account of their sex. 42 U.S.C. §2000e-2(a)(1). Plaintiffs further contend that such discrimination constituted a limitation, segregation, and classification of General Motors' employees in such a way as to deprive or tend to deprive them of employment opportunities and otherwise adversely affect their status as employees, solely on account of their sex. 42 U.S.C. §2000e-2(a)(2). General Motors does not deny that it had classified plaintiffs in such a way so as to deny them employment opportunities.

It is uncontroverted that General Motors complied with the Ohio "protective" laws up until May 1, 1970, and as a result of its compliance, women were discriminated against in the general manner in which plaintiffs allege. However, General Motors asserts as an affirmative defense to the Title VII action its compliance with the Ohio law—"protective" statutes.

As a matter of law, this Court finds that the Ohio "protective" laws, which regulate the hours and conditions of employment of women, do not create a bona fide occupational qualification, within the meaning of Title VII,

42 U.S.C. §2000e-2(h), but rather discriminate against women on account of sex. Accordingly, the Ohio "protective" laws are contrary to Title VII of the Civil Rights Act of 1964, and in light of the Supremacy Clause, are void and of no effect. U.S. CONST. art. VI, §2.

Nearly all federal courts which have considered the validity of various "protective" laws have found them to be in conflict with Title VII of the Civil Rights Act. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (thirty-five pounds); *Ridinger v. General Motors Corp.*, 39 U.S.L.W. 2548 (S.D. Ohio, March 24, 1971); *Caterpillar Tractor Co. v. Grabiec*, 317 F.Supp. 1304 (S.D. Ill. 1970); *Local 246 Util. Wkrs. U. v. Southern California Edison Co.*, 320 F.Supp. 1262 (C.D. Cal. 1969) (fifty pounds); *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969) (thirty pounds); *Rosenfeld v. Southern Pacific Co.*, 293 F.Supp. 1219 (C.D. Cal. 1968), *aff'd*, No. 23,983 (9th Cir. filed June 1, 1971) (3 FEP 604), where EEOC appeared as an *amicus curiae* because of the irreconcilable conflict between federal and state law. Subsequent to the filing of the *Rosenfeld* opinion, the State of California announced that it would not appeal, and thus, the California State Division of Industrial Welfare announced that it would no longer enforce the maximum hours and weight-lifting provisions of the California "protective" laws. *Contra, Jones Co. v. Walker*, 25 Ohio App.2d 141 (March 9, 1971), which opinion this Court finds unpersuasive and therefore declines to follow; *Gubrandson v. Genuine Parts Co.*, 297 F.Supp. 134 (D. Minn. 1968), which upheld the limitation of females lifting weights in excess of forty pounds. However, this Court has taken note of the fact that *Gubrandson* relied upon *Weeks v. Southern Bell Telephone Co.*, 277 F.Supp. 117 (S.D. Ga. 1967) (upholding a thirty pound limitation) and upon *Bowe v. Colgate-Palm-*

olive Co., 272 F.Supp. 332 (S.D. Ind. 1967) (upholding a thirty-five pound limitation) both of which were subsequently modified in 408 F.2d 228 (5th Cir. 1969), and 416 F.2d 711 (7th Cir. 1969), respectively, so as to be tantamount to a reversal with regard to the weight-lifting restrictions. Notwithstanding the subsequent modifications of those two cases which the *Gubrandson* court relied upon, *Gubrandson* can be distinguished from the majority federal court position, which is also the modern trend. In *Gubrandson,* the employer's physician determined that the plaintiff was not capable of performing the duties of the "male" job which she tried to obtain, and thus on an individual basis, as opposed to on a generic basis, could not lift the required weight related to the sought-after-job.

It is the conclusion of this Court that the restrictions embodied in the Ohio "protective" laws are unreasonably low, within the meaning of the EEOC Guidelines on Discrimination Because of Sex, which were in effect prior to August 19, 1969. 29 C.F.R. §1604.1(3). (Hereinafter the current EEOC Guidelines on Discrimination Because of Sex will be referred to as Guidelines.) Although some females most assuredly cannot lift weights in excess of twenty-five pounds, likewise some males cannot. *Local 246, Util. Wkrs. U. v. Southern California Edison Co., supra.*

This Court has rejected the contention of General Motors that the weight-lifting restriction is a bona fide occupational qualification, because that contention cannot be supported by Title VII of the Civil Rights Act. This Court started out with the premise that nothing in the Equal Employment Opportunities Act should be deemed to invalidate any state law unless such laws were inconsistent with the provisions of the Act. Furthermore, no person is exempt from liability under any state law not requiring or permitting the doing of an act which would

be an unlawful employment practice under the Equal Opportunity Act. 42 U.S.C. §2000e-7. This section was designed to preserve the effectiveness of state anti-discrimination laws. 110 Cong. Rec. 7243, 12721 (1964); *Local 246, Util. Wkrs. U. v. Southern California Edison Co., supra.* The fatal flaw of the Ohio "protective" laws is the treatment of females as a class and not on an individual basis. The Ohio "protective" laws on a generic basis, as opposed to on an individual basis, exclude women from working more than a forty-eight hour week, lifting weights in excess of twenty-five pounds, and require the furnishing of seats to female employees when not engaged in active duties for which they are employed. The upshot of the "protective" laws is the exclusion of women from certain positions on a generic basis, by stating that they are not physically or biologically suited for such employment. Apparently, this is a carryover of the stereotype that females are the weaker sex. Such employment practices constitute a violation of Title VII of the Civil Rights Act. 42 U.S.C. §2000e-2(a)(1) and (2).

The Ohio "protective" laws apply the "characteristics attributed to the group" to all female employees, 29 C.F.R. §1604.1(a)(1)(ii). An underlying purpose of Title VII is the recognition that women are now to be placed on an equal footing with men. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).[1] Female employees cannot be placed on an equal footing with male employees if the latter may be appointed to a particular position on a showing that they are physically qualified, when female employees are denied an opportunity to demonstrate their personal physical qualifications. Female employees will be placed on an equal footing, only

1. Hereinafter, reference to *Weeks* and *Bowe v. Colgate-Palmolive Co.*, will be to the respective circuit opinion.

when their fitness for the position is determined on the basis of a showing of individual capacity. *Rosenfeld v. Southern Pacific Co., supra.* See *Bowe v. Colgate-Palmolive Co., supra.* This even-handed policy alone complies with the Congressional purpose of eliminating subjective assumptions and traditional stereotyped conceptions pertaining to the physical ability of women to do particular work. See *Weeks v. Southern Bell Tel. & Tel. Co., supra.*

This Court specifically rejects, as others have done, the argument that the "protective" restrictions in question constitute a bona fide occupational qualification. The acceptance of an argument to the contrary would thwart the Congressional purpose codified in Title VII that individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious or sex groups.

The EEOC, created by the provisions of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-4, via its published Guidelines and policy statements, after a period of considerable hesitation, has adopted the position that state "protective" legislation of the type in question conflicts with the mandate of Title VII. 29 C.F.R. §1604.1 (b) (1) and (2). On August 19, 1969, the EEOC revoked a portion of its old Guidelines, formerly appearing as 29 C.F.R. §1604.1 (a) (3), (b), and (c), and inserted a new subsection (b). The new guideline provides:

> (b) (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g. the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during

certain hours of the night or more than a specified number of hours per day or per week.

(2) The Commission believes that such laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception. 29 C.F.R. §1604.1(b).

Even under the old guideline, 29 C.F.R. §1604.1(a)(3)(c), the EEOC declared in three cases interpreting it that the guideline should not be read as an approval of general weight limits on the basis of sex in any state, except when imposed on a highly individualized basis. *Bowe v. Colgate-Palmolive Co., supra;* 29 C.F.R. §1604.1(a)(1)(ii).

It is a well settled principle of administrative law that a court must accord deference to an administrative interpretation, formulated by an agency entrusted by Congress with developing expertise in a substantive area of the law, and specifically delegated the responsibility of formulating guidelines in implementing the Congressional mandate. *Griggs v. Duke Power Co., supra; Volkswagenwerk v. FMC,* 390 U.S. 261 (1968); *Udall v. Tallman,* 380 U.S. 116 (1964); *Weeks v. Southern Bell Tel. & Tel. Co., supra; Hicks v. Crown Zellerbach Corp.,* 45 F.R.D. 184 (D. La.

1968). It is the conclusion of this Court that the EEOC is reasonable in its determination that the "protective" restrictions do not constitute bona fide occupational qualifications within the meaning of Title VII. *Bowe v. Colgate-Palmolive Co., supra; Richards v. Griffith Rubber Mills, supra.* In sustaining the EEOC's application of the statutory interpretation, it is not necessary for this Court to hold that the conclusion reached is the only reasonable one, or even that it is the one this Court would have reached if it initially had decided the matter de novo. As set forth in *Weeks, supra*, in order to meet the bona fide occupational qualification test, there must be a factual basis for believing that all or substantially all women would be unable to perform safely the duties of the employment task in question. From a realistic standpoint, there cannot be a reasonable factual basis with regard to the "protective" laws in question. As stated by Mr. Justice Marshall in *Phillips v. Martin Marietta Corp.*, 39 U.S.L.W. 4160 (U.S. January 25, 1971) (concurring):

> The exception for 'bona fide occupational qualifications' was not intended to swallow the rule. That exception has been construed by the EEOC, whose regulations are entitled to 'great deference,' Udall v. Tallman, 380 U.S. 1, 16 (1965), to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex.

The Commission has given the only possible construction which is consistent with the Congressional mandate. With regard to the Ohio "protective" laws, females are denied employment opportunities on a basis other than on an appraisal of their individual physical capabilities and endurance in being able to perform the appropriate employment assignments. *See Bowe v. Colgate-Palmolive Co., supra.*

According to the holding of the instant case, the State of Ohio is not precluded from enacting protective laws which contain maximum hour and weight-lifting limitations, and require the furnishing of seats to the employees who are not actively engaged in work. However, those laws must apply to males and females on an even-handed basis. Such legislation would be in full compliance with the intention of Congress in enacting Title VII.

ISSUE III

The third issue before this Court is whether General Motors should be held liable for the unlawful employment practices engaged therein. This issue turns upon whether General Motors pursued the employment practices heretofore found to be unlawful in good faith reliance upon a written interpretation or opinion of the Commission. If such a defense is established, the issuing of an injunction or awarding of damages will be denied, notwithstanding that the interpretation or opinion relied upon is subsequently modified, rescinded or determined by judicial authority to be invalid or of no legal effect. 42 U.S.C. §2000e-12.

It is the conclusion of this Court that if General Motors does not establish the good faith reliance defense, the issuing of injunctive relief and awarding of damages may be appropriate. 42 U.S.C. 2000e-5(g). The requirement for having "intentionally engaged in or is intentionally engaging in an unlawful employment practice," within the meaning of 42 U.S.C. §2000e-5(g), which triggers the propriety of this Court to issue injunctive relief and award damages, is satisfied when the employer is shown to have "meant to do what he did, that is, his employment practice was not accidental." *Local 189, United Papermak. and*

Paperwork. v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The court in *Clark v. American Marine Corp.*, 304 F.Supp. 603, 607 (C.D. Cal. 1969), required that the unlawful employment actions be knowingly and voluntarily done. The employment practices in the case at bar, that is the acts themselves, were uncontrovertedly knowingly and voluntarily done, although under the mistaken belief that the acts were not in conflict with Title VII.

General Motors contends that its good faith reliance upon the EEOC guidelines which were in effect prior to August 19, 1969, constituted a complete defense to the granting of injunctive relief, as well as to the awarding of damages. In determining whether General Motors relied upon a written interpretation or opinion of the Commission with regard to employing the unlawful employment practices in question, it is necessary to keep in mind the following:

1. The section of Title VII entitled "Effect on State laws" expressly did not exempt or relieve employers from liability under state "protective" laws, other than those which required the performance of an act which would be an unlawful employment practice. 42 U.S.C. §2000e-7.

2. Title 42 U.S.C. §2000h-4 provides:

> Nothing contained in any title to this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

In the Court's opinion, the two aforementioned sections placed employers on the horns of a dilemma and furnished no meaningful guideline as to what conduct required by the State is unlawful under Title VII.

3. The EEOC Guidelines in effect prior to August 19, 1969, failed to take a definitive position with regard to the effect of the various "protective" statutes in light of Title VII, which clearly outlaws the classification of females on a generic basis. 110 Cong. Rec. 7247; *Griggs v. Duke Power Co.*, 39 U.S.L.W. 4317 (U.S. March 8, 1971). It is the position of this Court that until the Agency, entrusted with implementing the Congressional policy underlying the enactment of Title VII, takes a definitive position with regard to "protective" statutes vis-a-vis Title VII, it would be unreasonable for this Court to hold employers who are without the benefit of agency expertise to make an election at their own peril, as to whether they should comply with the Civil Rights Act and face criminal prosecution by the State of Ohio, or adhere to the law of the State of Ohio and face the possibility of being made a defendant in a civil rights action. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); See *General Electric Co. v. Hughes*, No. 7922 (S.D. Ohio filed May 3, 1971). As it turned out, General Motors chose to follow a statute which is in conflict with the federal Act. Therefore, it is the conclusion of the Court that General Motors did in fact rely in good faith on the Ohio "protective" laws, and thus injunctive relief and the awarding of damages is impermissible. 42 U.S.C. §2000e-12(b). In *Rosenfeld v. Southern Pacific Co.*, *supra*, the court concluded that the employer did not rely upon a written interpretation or opinion of the Commission but still did not award damages. The *Rosenfeld* Court stated that prior to a judicial determination an employer cannot be faulted for following the explicit provisions of

the applicable state law, when the impact of the federal law upon that of the state is unclear.

Subsequent to the modification of the Guidelines, General Motors continued to employ the same unlawful employment practices, contending that its reliance on the Ohio "protective" laws is still justified. Thus, the remaining sub-issue is whether this Court will fashion injunctive relief and award damages for the continued unlawful employment practices of General Motors subsequent to August 19, 1969, which could no longer be determined to have been justified, because there were no definitive guidelines for the employer to follow. In resolving this sub-issue, this Court is persuaded by the reasoning of the decision of the Southern District of Ohio in *Ridinger v. General Motors, supra.* In *Ridinger,* the court denied issuance of injunctive relief or the awarding of back wages, regardless of whether General Motors relied in good faith upon a written interpretation or opinion of the Commission. The *Ridinger* Court concluded that monetary damages could not be awarded against a person who in good faith complies with a statute subsequently declared unconstitutional. See *Pierson v. Ray, supra.* As of August 19, 1969, the Ohio "protective" laws had not been declared unconstitutional. However, as of that date, the EEOC Guidelines had been modified, but that modification does not require a contrary result. Although the determination of an agency entrusted with the administering of a statute is entitled to considerable weight, the final resolution of a constitutional question, as to whether Title VII supersedes state statutes regulating female employment via the Supremacy Clause, is within the province of the courts. Thus, until the courts are afforded an opportunity to resolve the issue, an employer cannot clearly predict that the Ohio "protective" statutes were invalid. Accordingly, damages cannot be had against such employers.

Moreover, General Motors undertook reasonable steps to remove itself from the horns of the dilemma subsequent to the EEOC's modification of its Guidelines. General Motors wrote a letter to William O. Walker, Director of the Department of Industrial Relations of the State of Ohio, who is one of the officers whose responsibility it is to initiate prosecution for any alleged violation of the Ohio female laws. Ohio Revised Code §§4107.44, 4107.50. The Director, in a reply letter on September 4, 1969, stated that the Department would not initiate such prosecutions, as the Ohio "protective" laws were in conflict with the new federal guidelines published by the EEOC. The aforementioned letter was published by the EEOC on September 24, 1969. On November 17, 1969, in response to General Motors' request of Walker to seek an opinion of the Ohio Attorney General as to the validity of the Ohio "protective" laws, the Director refused the request, stating that even if he elected not to prosecute, any county prosecutor or city solicitor could prosecute if he chose. General Motors contends that in reliance upon Walker's September 4th announcement that the Ohio "protective" laws would not be enforced, on May 1, 1970, General Motors ceased to comply with the Ohio "protective" statutes and no longer made a distinction between female and male employees. However, on September 14, 1970, General Motors was once again placed on the horns of a dilemma, when Walker announced that he would immediately begin to enforce the Ohio "protective" statutes.

As a result of the uncertainty which existed subsequent to August 19, 1969, pertaining to the validity of the Ohio "protective" statutes, this Court finds that General Motors' compliance with those statutes until May 1, 1970 does not afford a basis for awarding damages, as it could not possibly be held accountable for its failure to predict

the future development of constitutional law. *Pierson v. Ray, supra* at 557; *Ridinger v. General Motors, supra.*

Since General Motors has voluntarily ceased to comply with the statutes in question, there is little likelihood, if any, that female employees of General Motors will be deprived of future employment opportunities, resulting from General Motors' compliance with the Ohio "protective" statutes. Therefore, the request for injunctive relief is denied. However, this Court will retain continuing jurisdiction, so as to insure that General Motors does not alter its policy and commence complying with the Ohio "protective" statutes.

In light of the aforementioned holding, this Court need not, and deferring to the well settled constitutional doctrine of not deciding an unnecessary constitutional question, will not, determine whether the Ohio "protective" laws are in violation of the Equal Protection Clause of the Fourteenth Amendment.

This opinion will constitute the Court's findings of fact and conclusions of law.

Plaintiffs are entitled to an award of reasonable attorney's fees against the defendant General Motors. If counsel for the parties are unable to agree upon the amount of such fees, upon their so advising the Court, the matter will be set for hearing in order to present evidence which will enable the Court to fix proper fees.

Counsel for the plaintiffs shall promptly prepare and submit an order expressive of these findings and conclusions in accordance with Rule 4(b) of the Rules of this Court.

/s/ DON J. YOUNG
United States District Judge

APPENDIX C

Order of the District Court

(Filed October 1, 1971)

No. C69-334

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

VIRGINIA MANNING *et al.*
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION *et al.*
Defendants.

ORDER

This cause came on to be heard on motions for summary and declaratory judgment filed by defendants General Motors Corporation, William O. Walker and Gabriel Blumer and by the plaintiffs International Union UAW and Local 913 UAW and upon the motion of plaintiff, Virginia Manning and her class, for declaratory judgment, and the Court having considered all of the documents filed with respect thereto, including the pleadings, affidavits and memoranda, concludes that the motions for summary and declaratory judgment are well taken. The Court has arrived at findings of fact and conclusions of law which are set forth in a written opinion filed herein on August 10, 1971 (Rule 52 F.R.C.P.) and which is incorporated herein by reference. This order is entered in implementation of said findings of fact and conclusions of law.

The Court having found that compliance with the Ohio female protective legislation by the defendant General Motors Corporation constituted discrimination against the plaintiff and the members of her class and that the conciliation agreement signed by the plaintiff and some of the members of her class does not release General Motors Corporation and the Court further having found that General Motors was in good faith in its reliance upon the mandate of such Ohio protective legislation and the initial Guidelines issued by the Equal Employment Opportunity Commission up to May 1, 1970 when General Motors Corporation ceased its compliance with the Ohio female protective legislation, it is

ORDERED that the Ohio female protective statutes, Ohio Revised Code Sections 4107.42, 4107.43 and 4107.46 are contrary to Title VII of the Civil Rights Act of 1964 and are, therefore, void and of no effect by reason of the Supremacy Clause, United States Constitution, Article VI, Section 2, and that the Court need not and will not determine whether the Ohio female protective legislation is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and it is

FURTHER ORDERED that the conciliation agreement executed by Virginia Manning and some members of her class be held to be a release of the local union only and does not release or relieve General Motors Corporation from liability, and it is

FURTHER ORDERED that General Motors was in good faith relying upon the Guidelines of the Equal Employment Opportunity Commission which were in effect prior to August 19, 1969, and it is

FURTHER ORDERED that because of the uncertainty of the validity of the Ohio female protective legislation and

the resultant dilemma in which the defendant General Motors Corporation by reason thereof found itself and because General Motors Corporation in good faith relied upon and complied with said Ohio female protective legislation and the initial Equal Employment Opportunity Commission Guidelines, and subsequent to the change in said Guidelines took reasonable steps to resolve said dilemma, General Motors is not to be held liable for damages for a failure to predict the future development of constitutional law and is therefore not liable to the plaintiffs or any of them for any damages, the prayer for damages being hereby denied, and it is

FURTHER ORDERED that since General Motors Corporation has voluntarily ceased to comply with the Ohio female protective legislation in question, the request for injunctive relief be, and it hereby is, denied, and it is

FURTHER ORDERED that this Court is retaining continuing jurisdiction so as to insure that General Motors Corporation does not alter its policy and commence complying with said Ohio female protective legislation, and it is

FURTHER ORDERED that the plaintiffs are entitled to an award of reasonable attorney fees against the defendant General Motors Corporation to be agreed upon between the parties and, if they are unable to so agree, to advise the Court and that this matter will then be set for a hearing to determine same.

Objections and exceptions of the parties to the Court's findings and conclusions and to this order are noted and saved.

/s/ DON J. YOUNG
United States District Judge

APPENDIX D

Conflicting Decision of Ninth Circuit Court of Appeals

[¶ 7882] *Mary Lou Schaeffer, Plaintiff-Appellant v. San Diego Yellow Cabs, Inc. et al., Defendants-Appellees.* No. 71-1442.

Same, Plaintiff-Appellee v. Same, Defendants. Division of Industrial Welfare and Industrial Welfare Commission of State of California, Intervenor Defendant-Appellant. No. 71-1244.

United States Court of Appeals, Ninth Circuit. June 20, 1972.

On Appeals from United States District Court, Southern District of California. Reversed and Remanded.

Title VII—Civil Rights Act of 1964

Court Action—State Protective Laws—Ruling on Validity—Jurisdiction—Absence of Controversy.—In view of the concession by state authorities as to the invalidity of a state protective law establishing maximum hours of employment for women, there was no longer any controversy warranting review of a trial court's jurisdiction to rule on the validity of the law in a proceeding in which the state was not joined as a party.

Back reference.—¶ 2555.10.

Sex Discrimination—Limits on Hours of Work—State Protective Law—Back Pay—Period of Liability.—Although an employer may be accorded a defense to an assessment of back pay to a female employee deprived of extra earn-

ings under a practice of allowing men to work longer hours than women in his reliance on the requirements of a state protective law limiting the hours females could be employed, a balancing of the female employee's claim for back pay and the public policy behind it against the hardship on the employer requires that the employee be compensated for the extra hours she would have worked except for the discriminatory practice from the date the employer became aware of a trial court's determination and of an EEOC policy change holding that the state protective law was invalid because it conflicted with the sex discrimination provisions of federal law. It would be unfair to require an innocent employee to forego her rights under law by relieving the employer of his back pay liability until there was a final court decision on the state law's validity. 42 U. S. C. Sec. 2000e.

Back references.—¶ 2665; Cal. ¶ 20,799.91.

Sex Discrimination—Limits on Hours of Work—Award of Back Pay—Attorney's Fees.—Since the allowance of reasonable attorney's fees in civil rights cases is an important feature of the enforcement provisions of the Act and since the amount of the award should be proportionate to the extent to which the complainant succeeds in the suit, a determination on appeal that a complaining employee is entitled to a portion of the back pay claimed warrants remand for reconsideration of an award of attorneys' fees that amounted to less than one-third of the fees claimed. 42 U. S. C. Sec. 2000e-5(k).

Back reference.—¶ 2580.10.

Before BARNES, WRIGHT, Circuit Judges, and BYRNE, District Judge.*

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* The Honorable William M. Byrne, Sr., United States District Judge, Central District of California, sitting by designation.

[*Statement of Case*]

BARNES, C. J.: Plaintiff Mary Lou Schaeffer brought this action against her employer, San Diego Yellow Cabs, Inc. (hereinafter the Company), under the Equal Employment Opportunities Act, Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e *et seq.* Plaintiff alleged that the Company had unlawfully discriminated between the sexes by refusing to permit her to work as many hours per day as male employees were permitted to work.

The jurisdiction of the lower court was based upon 28 U. S. C. § 1343 and 42 U. S. C. § 2000e-5(f). Jurisdiction in this court exists under 28 U. S. C. § 1291.

Plaintiff Schaeffer was employed by the defendant Company as a taxicab driver on March 18, 1966. In October of 1966, Schaeffer requested that she be permitted to work 9-hour days. The Company refused as, at that time, it did not permit any of its female drivers to work more than 8-hour days, though male drivers were allowed to work 9-hour days. This limitation on female drivers was in compliance with Section 1350 of the California Labor Code, and Transportation Order No. 9-68 of the California Industrial Welfare Commission, 8 Cal. Admin. Code § 11460.

In January of 1967, Schaeffer filed charges of discrimination with the Equal Employment Opportunity Commission (hereinafter the Commission or E. E. O. C.). Her charge was rejected as the Commission concluded that the California statutes were valid. In January of 1968, she filed another charge with the Commission on the same grounds. While this second charge was pending, and on November 22, 1968, the case of *Rosenfeld v. Southern Pacific Company*, [1 EPD ¶ 9929] 293 F. Supp. 1219 (C. D. Cal. 1968) was decided. *Rosenfeld* dealt with sex dis-

crimination in employment, and held that various provisions of the California Labor Code, including § 1350, were invalid as conflicting with the Equal Employment Opportunities Act. On January 22, 1969, the Commission reversed its previous ruling and found that there was reasonable cause to believe that the Company was committing unlawful employment practices.

In September of 1969, Schaeffer received notice from the Commission that attempts to secure voluntary compliance had failed, and that she could institute a civil action. On October 7, 1969, the Company announced to its female drivers that they would be allowed to work full 9-hour days like the male drivers.

On the same day, plaintiff Schaeffer filed her complaint. She named as defendants the Company and her union, the Transportation and Allied Workers of California.[1] She sought in her complaint, one, a declaration that Sections 1350 and 1350.5 of the California Labor Code, and Transportation Order No. 9-68 of the California Industrial Welfare Commission were invalid; two, an injunction directing the Company to allow her to work 9-hour days; three, damages for the amount of pay she would have earned if she had been permitted to work 9-hour days since October 15, 1966; and four, attorney's fees and costs.

Following a trial, the court below entered its judgment declaring the California "hours" laws and regulations invalid, and awarding plaintiff $600 attorney's fees. The court denied damages for the lost work time, and refused to issue an injunction in light of the Company's change in policy. Schaeffer filed appeal No. 71-1442, challenging the refusal to award damages and the allowance

1. The union's motion for summary judgment was granted, and it is not a party in either appeal.

of only $600 in attorney's fees. The Commission was permitted to file an *amicus curiae* brief.

The Division of Industrial Welfare and the Industrial Welfare Commission of the State of California (hereinafter California) then sought to intervene as defendants in order to attack the court's rulings on the validity of the statutes and regulations. Eventually, the court granted the motion to intervene, but denied the request for relief. California then filed appeal No. 71-1244.

I. Appeal No. 71-1244

After judgment was entered by the district court and the appeals were filed, this court on June 1, 1971, handed down its opinion in *Rosenfeld v. Southern Pacific Company*, [3 EPD ¶ 8091] 444 F. 2d 1219 (9th Cir. 1971). In *Rosenfeld*, we held that, under the provisions of 42 U. S. C. § 2000e-7, state legislation could not justify discriminatory treatment of women in employment practices which conflicted with federal law. The State of California decided not to appeal this decision to the United States Supreme Court. Instead, it announced on June 24, 1971, that it would no longer enforce the maximum hours provisions of Sections 1350 and 1350.5.

Consequently, the State of California informed this court that in this case it no longer desired to press its claim that those sections of the Labor Code did not conflict with Title VII of the Civil Rights Act of 1964, and withdrew any claim the state statutes are valid. However, California wishes to continue its attack on the jurisdiction of the district court to declare Sections 1350 and 1350.5 invalid. California argues that no case or controversy existed in the district court on this issue as neither the Company nor the union, the two original defendants, were maintaining the validity of those statutes. It was only after the judg-

ment was entered by the district court, and California intervened, that any arguments in defense of the statutes were presented.

We decline to reach the issue urged by California on appeal. By conceding that the state maximum hours statutes in question conflict with federal law, California has effectively mooted the issue of the district court's jurisdiction to rule on the validity of these statutes.

While plaintiff Schaeffer is named as appellee in appeal No. 71-1244, she no longer is directly interested in the question of the *jurisdiction* of the court below *to determine the validity of the California statutes.* No one challenges the jurisdiction of that court to rule upon Schaeffer's claim for damages. As the invalidity of the California statutes is now admitted, any action by this court, either affirming or reversing the district court's jurisdiction to consider the issue of the validity of the California statutes, cannot affect Schaeffer's appeal on the issue of damages.

California's sole purpose in pursuing this appeal is to obtain a ruling on the scope of a district court's jurisdiction to declare a state statute invalid when the state is not joined as a party. If we made such a ruling, it would be merely an advisory opinion, for no "live" controversy exists between California and Schaeffer.

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *Local No. 8-6, Oil, Chemical and Atomic Workers, etc. v. Missouri,* [39 LC ¶ 66,135] 361 U. S. 363, 367, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960)." *Rosenfeld v. Southern Pacific Company,* 444 F. 2d at 1221.

Therefore, we dismiss appeal No. 71-1244 on the grounds that it does not present a case or controversy between the parties to this action.

II. Appeal No. 71-1442

A. Back Pay

Plaintiff Schaeffer contends that under § 706(g) of Title VII of the Civil Rights Act of 1964,[2] she is entitled to back pay for the hour per day she was prevented from working by her employer. The *amicus* brief filed by the Commission deals almost exclusively with material supporting Schaeffer's damages claim.

Liability under § 706(g) only attaches to an employer who intentionally engages in an unlawful employment practice. We agree with the Fifth, Seventh, and Tenth Circuits, and adopt a broad interpretation of the term "intentionally" to include all employment practices engaged in deliberately rather than accidentally. *Local 189, United Papermakers and Paperworkers v. United States,* [2 EPD ¶ 10,047] 416 F. 2d 980, 996 (5th Cir. 1969), *cert. denied,* [2 EPD ¶ 10,177] 397 U. S. 919 (1970); *Sprogis v. United Air Lines, Inc.,* [3 EPD ¶ 8239] 444 F. 2d 1194, 1201 (7th Cir. 1971), *cert. denied,* [4 EPD ¶ 7588] 404 U. S. 991 (1971); *Jones v. Lee Way Motor Freight, Inc.,* [2 EPD ¶ 10,283] 431 F. 2d 245, 250 (10th Cir. 1970), *cert. denied,* [3 EPD ¶ 8139] 401 U. S. 954 (1971); see *Griggs v. Duke Power Co.,* [3 EPD ¶ 8137] 401 U. S. 424 (1971). The prac-

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2. "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)." 42 U. S. C. § 2000e-5(g).

tice of the Company in allowing men to work longer than women comes within this interpretation of § 706(g). The fact that the Company may have been relying on a state statute does not make their actions any less of a violation under § 706(g). *LeBlanc v. Southern Bell*, [4 EPD ¶ 7674] 333 F. Supp. 602 (E. D. La. 1971).

However, the conclusion that the company violated § 706(g) does not automatically entitle Schaeffer to the damages she demands. A court may enjoin and may award damages, but should only order affirmative action, such as back pay, when such relief is "appropriate". In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunities Act and the fundamental concepts of fairness.

The Company argues that reliance on a state statute which the employer believes in good faith to be enforceable should serve as a complete defense to damages for back pay. *LeBlanc v. Southern Bell, supra; Kober v. Westinghouse Electric Corp.*, [3 EPD ¶ 8176] 325 F. Supp. 467 (W. D. Penn. 1971); *Ridinger v. General Motors Corporation*, [3 EPD ¶ 8175] 325 F. Supp. 1089 (S. D. Ohio 1971).

Plaintiff and the Commission respond that the purpose of the Equal Employment Opportunities Act is better served by showing preference to the innocent employee over the innocent employer. They argue that to permit the defense claimed by the Company would discourage employees from attacking unlawful practices involving state statutes by removing an important financial incentive. The Commission cites a number of cases under the Fair Labor Standards Act and the National Labor Relations Act which hold that lack of intent to violate federal labor statutes and good faith reliance on orders of administrative agencies

are not defenses to claims for back pay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, [61 LC ¶ 10,518] 396 U. S. 258 (1969); *Hodgson v. American Can Co.*, [3 EPD ¶ 8171] 440 F. 2d 91 (8th Cir. 1971); *Schultz v. Mistletoe Express Service, Inc.*, [64 LC ¶ 32,424] 434 F. 2d 1267 (10th Cir. 1970); *American Machinery Corp. v. NLRB*, [62 LC ¶ 10,808] 424 F. 2d 1321 (5th Cir. 1970); *Laidlaw Corp. v. NLRB*, [60 LC ¶ 10,272] 414 F. 2d 99 (7th Cir. 1969); *Wirtz v. Malthor, Inc.*, [57 LC ¶ 32,022] 391 F. 2d 1 (9th Cir. 1968).

Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a goodfaith employer.

When Schaeffer first requested permission to work 9-hour days in October of 1966, the Company would have been required to violate a state statute in order to grant her request. Under the generally prevailing conception of the scope of Title VII, it was reasonable for the Company to assume that the state statutes involved were valid, and could be successfully enforced. The Commission's rejection of Schaeffer's charges in 1967 supported the Company's actions.[3] When Schaeffer filed her second charge in January of 1968, the basic situation was the same.

However, on November 22, 1968, the district court issued its opinion in *Rosenfeld v. Southern Pacific Company*, [1 EPD ¶ 9929] 293 F. Supp. 1219 (C. D. Cal. 1968). The Company admits that it knew of this case shortly after it was decided. In January of 1969, the Commission reversed

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3. Under the regulations promulgated by the Equal Employment Opportunities Commission and in effect in 1965-1969, the state statutes involved here would have been considered valid. 29 C. F. R. § 1604.1(b) and (c), 30 Fed. Reg. 14927 (Dec. 2, 1965). Although the Commission reversed its thinking in this matter about 1968, it was not until mid-1969 that the regulations were amended. 29 C. F. R. § 1604.1(b), 34 Fed. Reg. 13368 (Aug. 11th, 1969).

its position and concluded that there was probable cause to believe that the Company was engaged in an unlawful employment practice.

We believe that by the time the Company had notice of both the *Rosenfeld* decision in the district court and the Commission's reversal in policy, reliance upon the state statute in continuing to deny Schaeffer the right to work 9-hour days could no longer be considered to be in good faith and serve as a defense against the damages.[4] We conclude, therefore, that Schaeffer is entitled to receive back pay for the extra hour per day from the date when the Company had knowledge of both the *Rosenfeld* case *and* the Commission's decision in favor of Schaeffer (i.e., on some undertermined date subsequent to 1/22/69, to and including 10/7/69, the date the company allowed 9-hour daily employment for women).

We reject the argument that an employer should not be held for claims of back pay until a "final" court decision, such as our decision in *Rosenfeld* in June of 1971. It is unfair to force an innocent employee to forego his rights under law while litigation drags through the courts (which, in the *Rosenfeld* case, took nearly three years).

We do not understand that our earlier statements in *Rosenfeld's* penultimate paragraph (concerning prospective application of that decision) to bar the result we reach in this case. 444 F. 2d at 1227. We are not applying the *Rosenfeld* decision retroactively. The Company was in violation of federal law for a certain time prior to the date this suit was filed. *Rosenfeld* did not intend to

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4. We reject the idea advanced by the Commission that the Company should be held responsible for failing to file a declaratory judgment action against the state to obtain a ruling on the validity of the statutes. A company in such a case cannot always, and perhaps never can, be expected to press a claim on behalf of its employees with sufficient fervor to insure as adequate presentation of the merits of the claim before the court.

automatically forgive all violations of Federal law that occurred prior to that decision. Plaintiff in this case had filed her suit in the district court well before the decision in *Rosenfeld* by this court. We stated in *Rosenfeld* that our decision would not necessarily affect actions pending prior to our decision. 444 F. 2d at 1227.

As stated we feel that a proper balance between the Company and Schaeffer would be had by holding the Company liable for damages from the time it had notice of the district court's decision in *Rosenfeld* and the Commission's reversal in position, up to and including 10/7/69. We therefore remand this case to the district court so that it may reopen the matter, take testimony, and calculate the amount of damages.

B. Attorney's Fees

Section 706(k) of Title VII grants a district court discretion to allow the prevailing party reasonable attorney's fees. The court below awarded Schaeffer $600 in attorney's fees, though an itemized claim for $2,220 was submitted. The court stated no reasons for allowing less than one-third of the claimed fees, but it was not required to do so.

The allowance of reasonable fees in civil rights cases is an important feature of the enforcement provisions of that Act. See *Newman v. Piggie Park Enterprises, Inc.*, [2 EPD ¶ 9834] 390 U. S. 400 (1968). The amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices. However, the amount of the award should also be proportionate to the extent to which the plaintiff prevails in the suit. We believe that the district court should reconsider the award of attorney's fees in light of our decision that plaintiff is entitled to a small portion of the back pay claimed

by her. We do not intend to express any opinion whether the amount of fees to be awarded should or should not be enlarged over the amount heretofore allowed. We recognize a large discretion on such matters rests with the trial court, guided by the usual principles of how such matters are determined.[5]

Appeal No. 71-1442 is *reversed* and remanded for further proceedings suggested herein.

Appeal No. 71-1244 is *dismissed*.

[Dissenting Opinion]

BYRNE, D. J. (dissenting):

I respectfully dissent from that part of the opinion in Appeal No. 71-1442 relating to the allowance of damages.

This controversy should be added to the ranks of those cases which recognize that employers acting pursuant to obligatory state laws cannot be deemed to have intentionally violated Section 706(g) of Title VII. *LeBlanc v. Southern Bell*, [4 EPD ¶ 7674] 333 F. Supp. 602 (E. D. La. 1971); *Kober v. Westinghouse Electric Corp.*, [3 EPD ¶ 8176] 325 F. Supp. 467 (W. D. Penn. 1971); *Ridinger v. General Motors Corporation*, [3 EPD ¶ 8175] 325 F. Supp. 1089 (S. D. Ohio 1971); *Richards v. Griffith Rubber Mills*, [2 EPD ¶ 10,001] 300 F. Supp. 338 (D. Ore. 1969).

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5. Although no attorneys' fees were requested by appellant Schaeffer on this appeal, the Commission draws our attention (by letter subsequent to argument) to the case of *Malone v. North American Rockwell Corporation*, [4 EPD ¶ 7736] ..... F. 2d ....., (No. 26009, decided by this court on March 23, 1972). The statute (42 U. S. C. § 2000e-5(k)) is available only to the appellant Schaeffer and is couched in permissive language. Under the particular circumstances of this case, we award no attorneys' fees, as costs, on this appeal. Appellant is entitled to her ordinary costs, as the prevailing party.

The fact that Yellow Cab continued to rely on state law after the District Court ruling in *Rosenfeld* does not alter its position. This court, in affirming Judge Ferguson's ruling, acknowledged that such lower court decisions do not, *ipso facto*, relieve employers of their fealty to state law:

> "Moreover, in view of the California statutes referred to above, the conclusion that the company engaged in 'discrimination' in refusing to assign plaintiff to the Thermal position carries with it no invidious connotation. Prior to a judicial determination such as evidenced by *this* opinion, an employer *can hardly be faulted for following the explicit provisions of applicable state law.*" (emphasis added)

Rosenfeld v. Southern Pacific Co., 444 F. 2d at 1227.

Here, the district court found the acts of sex discrimination committed by the Yellow Cab Company were the product of good faith reliance upon the laws of California and not intentional commission of unlawful employment practices. Accordingly, the court found that damages for loss of wages for the period of time when the restriction operated was "not authorized."

The majority adopts the argument of the plaintiff that if there are two innocent parties to a controversy, preference should be shown to the innocent employee over the innocent employer.

If both are innocent, why should either be penalized?

I would affirm.